United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2125

To be argued by
ALAN M. GOLDSTON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2125

SAMUEL SANTORO,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Samuel Santoro appeals from an order with memorandum opinion filed September 23, 1976, in the United States District Court for the Southern District of New York, by the Honorable Milton Pollack, United States District Judge, denying Santoro's petition pursuant to Title 28, United States Code, Section 2255, to vacate his sentence and set aside his judgment of conviction.

Indictment 71 Cr. 8, filed on January 7, 1971, charged Santoro and four others with violations of the federal extortionate credit statutes. Santoro himself was charged with seven counts of collecting extensions of credit by extortionate means in violation of Title 18, United States Code, Section 894; eight counts of financing extortionate extensions of credit in violation of Title 18, United States

Code, Section 893; one count of making extortionate extensions of credit in violation of Title 18, United States Code, Section 892; and one count of conspiring to commit the aforementioned crimes in violation of Title 18, United States Code, Section 371. On August 24, 1971, after a seven day trial before Judge Pollack and a jury, Santoro was found guilty of all charges contained in the indictment.

Indictment 71 Cr. 1313, filed on November 24, 1971, charged Santoro with one count of bail jumping in violation of Title 18, United States Code, Section 3150. On January 25, 1972, Santoro pled guilty to this charge. On the same day, Santoro was sentenced by Judge Pollack on both convictions to a term of twelve years imprisonment; five years on Count One and seven years on the other counts of Indictment 71 Cr. 8, the seven-year sentence to be served consecutively to the five-year term. The Court also imposed a five-year concurrent term for the bail-jumping charge.

Santoro's conviction in 71 Cr. 8, as well as that of co-defendant, John Tortora,* was subsequently affirmed by this Court, *United States* v. *Tortora*, 464 F.2d 1202 (2d Cir. 1972), and certiorari was denied by the United States Supreme Court, *sub nom. Santoro* v. *United States*, 409 U.S. 1063 (1972).

On August 4, 1976, Santoro filed a petition under Title 28, United States Code, Section 2255, to vacate his conviction on the grounds that he had been denied effective assistance of counsel and his right to be present at trial to face his accusers. The petition was denied by Judge Pollack in a memorandum opinion and order filed on September 23, 1976. (A. 95-96).**

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* The remaining defendants were acquitted.

** Citations to "A" refer to pages in the separate appendix filed by Santoro; citations to "Br." refer to Santoro's brief.

Statement of Facts

On April 15, 1971, at a pre-trial conference held with respect to indictment 71 Cr. 8, counsel for all parties appeared before the District Court to schedule a date for trial. The Court scheduled trial for August 10, 1971. Santoro's counsel, Peter Rosato, advised the Court that his associate, Vincent Lanna, Santoro's counsel of choice, would be unavailable to try the case in August because of his military obligations. Affording Santoro four months to comply with its order, the Court directed Rosato that Santoro should find another trial attorney if Lanna could not appear.

On August 10, 1971, despite the Court's explicit order on April 15, 1971, to obtain substitute counsel if Lanna were to be unavailable, Santoro moved for an adjournment, citing Lanna's unavailability. The Court appointed Mr. Rosato and Mr. Mark Landsman jointly to represent Santoro at trial. Due to the unexcused absence of two other defendants,* no jury was impaneled until August 16, 1971, although a panel of veniremen had been assembled on August 10, 1971. The Court ruled, however, in light of the four-month notice to all parties of the August 10 trial date and of the reason for the delay in impanelling a jury, that at least as to Santoro, trial was "commenced" on August 10, 1971. (A. 47-48).

After August 10, and prior to August 16, the Government substantially disclosed its case by turning over to defense counsel all material required under 18 U.S.C. § 3500 (A. 54).

On August 16, 1971, Santoro failed to appear. His two appointed counsel were present, and stated that

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* Tortora and Chiaverini were hospitalized with assorted illnesses.

Santoro was aware that trial was to go forward on August 16, and that as recently as August 15 they had advised him to be present. (A. 37). Faced with these facts and the delay already caused by the other defendants in the case, the Court determined that "this absence on the part of Santoro, in light of the circumstances, was voluntary and intended, and clearly obstructs the progress of this case and is inexcusable, it being a voluntary absence." (A. 40).

The Court then proceeded to empanel a jury and try the case. Santoro's two appointed counsel participated in the trial. On August 24, 1971, both sides rested and the jury convicted Santoro on all counts charged in the indictment. On November 24, 1971, a Special Grand Jury empaneled in the Southern District of New York returned Indictment 71 Cr. 1313 charging Santoro with one count of bail jumping in violation of Title 18, United States Code, Section 3150.

Santoro was apprehended and appeared for sentencing on January 25, 1972, at which time he also pleaded guilty to the bailjumping charge. Judge Pollack sentenced Santoro to terms of imprisonment set forth above at p. 2.

Santoro took direct appeal from his August 24th conviction, vigorously arguing, *inter alia*, the precise grounds that were advanced in support of his § 2255 application, namely that he had been denied effective assistance of counsel and his right to confront his accusers. These contentions were extensively briefed and argued in Santoro's original appeal to this Court by his experienced appellate counsel, and were explicitly rejected by this Court. *United States* v. *Tortora*, 464 F.2d 1202 (2d Cir.), *cert. denied sub. nom. Santoro* v. *United States*, 409 U.S. 1063 (1972).

ARGUMENT

POINT I

The District Court Properly Denied Santoro's Motion To Vacate Sentence Based Entirely On A Claim Rejected At Trial And By This Court On Direct Appeal.

It is well settled in this Circuit and elsewhere that Section 2255 cannot be employed merely to relitigate questions raised and fully considered on direct appeal. *Williams* v. *United States*, 334 F. Supp. 669 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 1183 (2d Cir.), *cert. denied*, 409 U.S. 967 (1972); *Meyers* v. *United States*, 446 F.2d 37 (2d Cir. 1971); *Castellana* v. *United States*, 378 F.2d 231, 233 (2d Cir. 1967); *United States* v. *Granello*, 403 F.2d 337 (2d Cir. 1968), *cert. denied*, 393 U.S. 1095, *reh. denied*, 394 U.S. 1009 (1969); *United States* v. *Thompson*, 261 F.2d 809, 810 (2d Cir. 1958); see also, *McCartney* v. *United States*, 311 F.2d 475 (7th Cir. 1963); *Levine* v. *United States*, 430 F.2d 641 (7th Cir. 1970), *cert. denied*, 401 U.S. 949; *United States* v. *Marchese*, 341 F.2d 782, 789 (9th Cir.), *cert. denied*, 382 U.S. 817 (1965).

A fortiori, it is clear that the District Court "in post-conviction relief applications may exercise a sound discretion to decline to re-try issues fully and finally litigated in the proceedings leading to judgment of conviction and in the direct appeal therefrom". *Bearden* v. *United States*, 403 F.2d 782 (5th Cir. 1968), *cert. denied*, 393 U.S. 1111; *Del Genio* v. *United States*, 352 F.2d 304 (5th Cir. 1965). See also *United States* v. *Romano*, 516 F.2d 768, 770 (2d Cir. 1975); *United States ex rel. Schnitzler* v. *Foliette*, 406 F.2d 319 (2d Cir. 1969), *cert.*

denied, 395 U.S. 926 (1969), and *United States ex rel. Townsend* v. *Twomey*, 452 F.2d 350 (7th Cir.), *cert. denied*, 409 U.S. 854 (1972).*

In this case, Santoro urged in his § 2255 petition precisely the same grounds which he advanced, and which were rejected by this Court over four years ago in this same case on direct appeal. The record underlying Santoro's present argument has already been exhaustively reviewed by this Court, and, based on that review, this Court explicitly found, on precisely the same record now presented to it again, that Santoro had made a voluntary and knowing decision not to attend his trial and that in the light of numerous other factors present in the case ** it was proper to continue with the trial. Thus, this is simply not a case where a defendant has produced new

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* Indeed, the decision of this Court in *Schnitzler* suggests inferentially that, in the instant case, it would have been improper for the District Court to grant the application. *Schnitzler* involved a second petition for a writ under 28 U.S.C. § 2244. An earlier petition had been granted by the district court, but this Court had reversed. A second district court judge again issued the writ on the same ground previously rejected by the Court of Appeals. On appeal from that decision, this Circuit observed that 28 U.S.C. § 2244(b) does give the district court discretion to entertain successive identical applications for a writ of habeas corpus, but noted that "it hardly encourages such action" and that such discretion was subject to abuse. *Schnitzler*, *supra*, 406 F.2d at 321. Reviewing the principles governing the exercise of such discretion as set out in *Sanders* v. *United States*, 373 U.S. 1 (1963), the Court concluded that the same ground had been determined on the merits adversely to Schnitzler on the prior application, and he had not carried his burden of showing either that relevant facts had not been fully developed on the first application or that there had been an intervening change in the law. Accordingly, it held that the district court was required not to entertain the second application.

** We discuss those factors, *infra* at p. 9.

facts to challenge his conviction, compare *United States* v. *Franzese*, 525 F.2d 27 (2d Cir. 1975)—indeed, all the relevant facts were vigorously presented to this Court on the direct appeal. Nor is this a case where there has been a "change in the law" since the affirmance of Santoro's conviction. Compare *Davis* v. *United States*, 417 U.S. 333 (1974); *United States* v. *Loschiavo*, 531 F.2d 659 (2d Cir. 1976); *United States* v. *Travers*, 514 F.2d 1171 (1975); *United States* v. *Liguori*, 438 F.2d 663, 665 (2d Cir. 1971). Not only does Santoro not even claim such a change in the law since this Court's decision in Tortora, Br. at 29, but, as we indicate in Point II, there simply has been no such change.

In sum, the District Court properly exercised the discretion conferred upon it, *Machibroda* v. *United States*, 368 U.S. 487, 495 (1962); *United States* v. *Franzese*, *supra*, 525 F.2d at 32, in denying the petition. Indeed, this is a classic case where a District Court should deny successive applications for review of precisely the same requests for relief.

POINT II

This Court's Decision in *United States* v. *Tortora* Should Not Be Reviewed.

Our principal argument is that Santoro is not eligible for relief under the provisions of 28 U.S.C. § 2255. For this reason, we submit that a lengthy response to the substantive claims made in Santoro's brief would simply burden the Court unnecessarily. Indeed, the reasoning and precedents supporting the *Tortora* decision all appear in the unanimous opinion of the Court, which speaks for itself. Lest the Government be accused of having conceded the correctness of any portion of Santoro's argu-

ment, however, we do wish to make the following brief observations.

First, many of the decisions upon which Santoro relies simply do not stand for the propositions for which they are cited. For example, the key assertion of Santoro's brief is that it "has long been the rule in federal courts" that "the accused could not waive his right of presence . . . ." Br. at 15. The three cases then cited simply do not hold this, and certainly offer no guidance to the disposition of this case. *Both Hopt* v. *Utah*, 110 U.S. 574 (1884), and *Lewis* v. *United States*, 146 U.S. 370 (1892), involved court practices where, as a regular matter, significant portions of the jury selection process took place out of the presence of the jury.* *Schwab* v. *Berggren*, 143 U.S. 442 (1892), involved a claim that the defendant had a right to be present at argument of an appeal—a claim that the Supreme Court rejected. These decisions clearly have no bearing on the issue presented to this Court in *Tortora*, which involved the deliberate decision of the defendant to absent himself from the commencement of a multi-defendant trial.**

Second, not only has this Court's decision in *Tortora* not been overruled, but it has been cited as authority on numerous occasions both by this Court, *United States* v. *Schwartz*, 535 F.2d 160, 165 (2d Cir. 1976), and by other

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* In *Lewis*, "the court . . . directed each side to proceed with its challenges, independent of the other, and without knowledge on the part of either as to what challenges had been made by the other." 146 U.S. at 371.

** Indeed, in *Hopt* v. *Utah*, *supra*, the waiver issue was discussed simply because the defendant had not explicitly objected to the procedure, raising an issue whether the question had been preserved for appellate review.

courts. See, e.g., *United States* v. *Taylor*, 478 F.2d 689, 691 n.3 (1st Cir. 1973); *Downes* v. *Norton*, 360 F. Supp. 1151, 1154 (D. Conn. 1973); *Byrd* v. *Hopper*, 405 F. Supp. 1323, 1327 (N.D. Ga. 1976); *People* v. *Vega*, 363 N.Y.S. 2d 214, 217, 80 Misc. 2d 59 (Sup. Ct. Kings Cty, 1974). In addition, as Santoro notes, Br. at 17, this Court's decision has been followed in *Government of Virgin Islands* v. *Brown*, 507 F.2d 186, 189 (3d Cir. 1975) and *United States* v. *Peterson*, 524 F.2d 167, 182-86 (4th Cir.), *cert. denied*, 423 U.S. 1088 (1976).

Finally, Santoro simply fails to take note of the careful—indeed, cautious—treatment of his claims afforded him in this Court's prior opinion, in which this Court emphasized the "extraordinary" nature of the circumstances, 464 F.2d at 1210, or of the extremely dangerous consequences of a contrary decision. As this Court noted in *Tortora*, trial without the presence of the defendant must be avoided if at all possible, and should proceed, if at all, only when the trial judge has weighed

> "the likelihood that the trial could soon take place with the defendant present; the difficulty of rescheduling, particularly in multiple-defendant trials; the burden on the Government in having to undertake two trials, again particularly in multiple-defendant trials where the evidence against the defendants is often overlapping and more than one trial might keep the Government's witnesses in substantial jeopardy."[7]

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[7] It is difficult for us to conceive of any case where the exercise of this discretion would be appropriate other than a multiple-defendant case."

To hold that a District Court, even after weighing all these circumstances, is nonetheless without discretion to

continue would leave trial courts powerless to contend with defendants, like Santoro, who are determined to frustrate the orderly process of trial.* Under such a rule, for example, defendants in a multi-defendant case could generate severances to which they are not entitled and dramatically multiply the amount of time the Government and the courts must spend in trying them by the simple expedient of disappearing on the morning of trial and reappearing one by one.** Particularly under the new and increasingly stringent standards set by the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161 *et seq.*, and rules promulgated thereunder, permitting such dislocation would cause chaos.

In short, this Court's decision in *United States* v. *Tortora* was eminently correct; no developments since the time of that decision suggest any reason why it should be overruled.

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* In addition, as this Court foresaw in *Tortora*, 464 F.2d at 1210, a defendant could evade the requirements of *United States* v. *Cannone*, 528 F.2d 296 (2d Cir. 1975), and discover the identities of Government witnesses for violent purposes.

** It is of course true, as Santoro points out, that defendants may be punished for such behavior, either under the contempt statute, 18 U.S.C. § 401, or by indictment for bail-jumping. Infliction of these penalties, however, could not deny such defendants the severances or postponements they impermissibly seek, nor, in the event of the common practice of imposing concurrent sentences for the later crime (as was done to Santoro) would it be likely to have significant deterrent effect.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ALAN M. GOLDSTON, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 21st day of December 1976 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Pierce O'Donnell, Esq.
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And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Alan M. Goldston

ALAN M. GOLDSTON

Sworn to before me this

21st day of December, 1976

Steven K. Frankel

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